NO. 82-1156

In the Supreme Court of the United States

OCTOBER TERM, 1982

TELEDYNE MOVIBLE OFFSHORE, INC. and ARGONAUT INSURANCE COMPANY,

Appellants,

v.

DAN THOMPSON,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

May the Louisiana worker's compensation statute validly be applied to a claim by a worker against his employer for injury occurring as a result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the resources of the outer Continental Shelf or is the application of state law to such an injury precluded by the provisions of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(b)?

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Appellants, TELEDYNE MOVIBLE OFFSHORE, INC. and ARGONAUT INSURANCE COMPANY, are compelled to submit this brief in opposition to the appellee's Motion to Dismiss or Affirm and in view of the Brief for the United States as Amicus Curiae urging dismissal of the appeal for want of a substantial federal question.

ARGUMENT

The importance of the issue presented in this case, and the misconceptions which might flow from the briefs filed in opposition to our plea for a hearing, prompt this reply brief.

We reemphasize (and one of the opposing briefs, that was filed by the appellee, apparently concedes[1]) that the issue is not preemption, but adoption: Did Congress intend to adopt the state worker compensation laws for injuries occurring as the result of activities for the production of minerals on the outer Continental Shelf?

When the issue is properly viewed, 43 U.S.C. § 1333(a) cannot be read or interpreted in a vacuum; the Court must look to Subsection (b) as well. The language of the two, read together, tells the applier of law that:

> The...laws...of the United States are extended to the subsoil and seabed of the outer Continental Shelf and all artificial islands... [43 U.S.C. § 1333(a)]

and

> *To the extent that they are...not inconsistent with this subchapter* or with other federal laws and regulations...now in effect or hereafter adopted, the civil...laws of each adjacent state...are declared to be the law of the United States... [43 U.S.C. § 1333(2)(a)] (emphasis supplied)

however

> With respect to disability or death of an employee resulting from any injury occurring as a result of

[1] The Government's brief apparently argues that even if it is an "adoption" case, state law is not being applied as "surrogate federal law," but applies of its own force. (See Page 13, Brief of United States as Amicus Curiae.) This position is amazing in the light of the decision of this Court in *United States v. California*, 332 U.S. 19, 67 S.Ct. 1658 (1947). After that decision, any application of state law beyond three miles necessarily is as "surrogate federal law" since the federal government has absolute sovereignty, viz a viz the state, beyond three miles.

> operations conducted on the outer Continental Shelf for the purpose of...developing...the natural resources...compensation shall be payable under the provisions of the Longshoremen's and Harbor Worker's Compensation Act... [43 U.S.C. § 1333(b)]

An example of inconsistency precluding adoption arises with the issue of whether the provision of the Louisiana worker's compensation law permitting recovery by the nondependent parents of a deceased worker is inconsistent with the provision of the LHWCA denying them any recovery. If a common sense approach is applied, the "inconsistency" is patent: when one law grants recovery under certain facts, and another law denies recovery under those identical facts, the two laws are inconsistent. Even if we look beyond the plain meaning of the language of the statute to determine if there is an "inconsistency" in the light of what Congress was attempting to achieve, the result is the same. Congress specifically made the LHWCA applicable by Subsection (b); thus application of the LHWCA is a specific congressional desire, and not a judicially constructed afterthought. As this Court has previously noted, the LHWCA represents a pervasive regulation of all of the rights between the employer and the employee (or his beneficiaries); the underlying theme is that where there is coverage, the employer, without regard to its fault and with virtually no defense, must pay "ultra-generous" benefits to the employee or, in some cases, his beneficiaries. However, the "quid pro quo" is that the employer owes nothing else to no one else by virtue of the employee's injury or death. The importance of this "trade off" to the LHWCA is illustrated by this Court's decisions in *Edmonds v. Compagnie Generale Transatlantique* 443 U.S. 256, 99 S.Ct. 2753 (1979), and in *Bloomer v. Liberty Mut. Ins. Co.*, 445 U.S. 74, 100 S.Ct. 925 (1980). The net effect of those two decisions is that when

an employer pays LHWCA benefits, he is entitled to recover the full amount he has paid from a negligent third party, without regard to his own negligence which may have been an overwhelming cause of the employee's injury. Thus, when viewed in the light of the congressional purpose, a state law is "inconsistent" when it alters the employer's liability to the employee or others for a work-related injury—the "quid pro quo" for the employer's near-absolute liability to the employee for such injury.

The state court's decision below is, in effect, that state law may be used to provide recovery on the outer Continental Shelf where Congress has "spoken directly to the question" and has expressed its "considered judgment" that such recovery should not be had. *Potomac Electric Power Co. v. Director*, __ U.S. __, 101 S.Ct. 509 (1980). The incompatability of the state court's decision with the spirit of this Court's decision in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010 (1978), is obvious.

The inconsistency in this case is patent. There are a number of other inconsistencies between the Louisiana worker's compensation statute and the LHWCA which are pointed out in the Jurisdictional Statement (see Pages 6-10). The briefs filed in opposition to appellants seek to minimize the import of these by assuming that where the statutes are inconsistent, the LHWCA will prevail, and the employer will not be subjected to double payment. The argument that the LHWCA nevertheless will prevail may have some merit where the issue is preemption, since "inconsistency" is merely a factor in determining whether Congress intended to supersede a preexisting applicable state statute. In this case, where the issue is adoption, and not preemption, the statutory language (43 U.S.C. § 1333) makes inconsistency the sole determinative factor as to

whether or not state law has been adopted in an area where federal law otherwise applies. The assertion that there will be no "double payment" by the employer is not necessarily so. As we have pointed out, there may be some "double payment" under existing law when the employee first proceeds under the state statute; where the employee first proceeds under the LHWCA and, subsequently seeks benefits under the state statute, the issue will turn upon the particular state law, and whether federal law "preempts" state law in that respect. If appellee's arguments are correct, there is no "preemption," and thus, there could be no "double payment." Even if there is no "double payment," there would be—as in the instant case—payment by the employer of more than he is obligated to pay under the LHWCA, and that, we submit, is a conclusion at odds with the spirit of the congressional compromise in the LHWCA.

The thrust of the opposition to a hearing in this Court on this important issue is that two prior decisions of this Court—*Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, __ S.Ct. __ (1980) and *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, __ S.Ct. __ (1981)—preclude this Court from reaching a result different from that reached by the Louisiana Supreme Court. The argument is fallacious, and can be quickly dispelled.

First, *Gulf Offshore* is simply irrelevant to the issues before this Court. In *Gulf Offshore*, this Court ruled that under 43 U.S.C. § 1349(b)(1), a state court could exercise concurrent judicial jurisdiction over claims arising on the outer Continental Shelf. That ruling has nothing whatsoever to do with the issue in this case, namely, whose substantive law may apply to worker compensation claims arising on the outer Continental Shelf. A simple illustration shows the absurdity of the argument: if opposing counsel

are right, the fact that federal and state courts exercise concurrent jurisdiction over Jones Act claims means that state substantive law may apply to a Jones Act claim brought in state court, even though that state substantive law is in conflict with the provisions of the Jones Act.

Secondly, *Sun Ship* is not controlling because it involves a completely different issue from that before this Court. In *Sun Ship*, the issue was preemption, i.e., whether a federal statute which invades—for the first time—a domain traditionally reserved to the states preempts the application of the previously applicable state law which is not in direct conflict with the federal statute. Considerations of comity loom large in preemption cases, as well they should. There is in many preemption cases a grating intrusion into an area of sovereignty previously reserved to the states, and our unique concept of dual sovereignty—"Our Federalism"—usually compels an application of any state law which does not directly conflict with the federal statute or do violence to the objective of the federal statute. For example, preemption of the state statute by the LHWCA in the *Sun Ship* type of case would result in a denial of recovery where, prior to the adoption of the federal statute, state law would have permitted recovery. In an "adoption" case, such as this is, beneficiaries, who never had a remedy under the superior federal law to begin with, are being denied a remedy by refusal of the federal sovereign to adopt state law. It is one thing to say that federal law takes away a state remedy within a state's boundaries; it is quite another to say that state law grants a remedy denied by federal law in an area within the federal sovereign's boundaries and outside the territorial United States.

Undoubtedly, there is language in this Court's decision in *Sun Ship* which supports the argument that

Congress did not intend to preempt the application of state worker's compensation when it adopted the LHWCA. But the LHWCA, by its very terms, is limited to (1) state territorial waters, and (2) certain "dry land" harbor areas. As the decision in *Sun Ship* carefully points out, these are areas where, prior to the adoption of the LHWCA or its 1972 amendments, state law applied, under the "maritime but local" doctrine.[2] None of the language in *Sun Ship* is necessarily relevant to the issue in this case, i.e., Congress' intent in adopting the Outer Continental Shelf Lands Act in 1953, or its amendments in 1979.

Were this a preemption case, this Court might want to reevaluate its decision in *Sun Ship*. Certainly, "the scheme of federal regulation in the LHWCA is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152 (1947). The difficulties and uncertainty produced by the *Sun Ship* decision are monumental in scope, as we have pointed out. Be that as it may, *Sun Ship* does not compel the same result in this case.

CONCLUSION

This Court should take an independent look at the issues in this case in the light of the principles which are applicable, and come to the proper conclusion.

Respectfully Submitted

JOEL E. GOOCH

[2] 447 U.S. 719-20, 100 S.Ct. 2436.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing brief has been mailed to Robert L. Beck, Jr., P.O. Box 222, Alexandria, Louisiana 71301, by depositing the same in the U.S. Mail, postage prepaid on August _____ 1983.

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